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ALEXANDER L. STEVAS,

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No. 83-____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ORANGE COUNTY and KENNETH KIENTH,
Petitioners,

v.

BEATRICE S. WOOD and SANDRA SURBURG RITTER,
on behalf of themselves and all others similarly situated,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT; AND THE
UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA**

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QUESTIONS PRESENTED

1. Does the United States Supreme Court decision in *District of Columbia Court of Appeals v. Feldman*, ____ U.S. ____, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), permit a federal court to make an exception to the jurisdictional bar precluding a federal court from acting as an appellate court to review state court decisions, when a federal court plaintiff asserts that he has had "no reasonable opportunity" to raise constitutional claims in a previous state court proceeding?

2. What constitutes "reasonable opportunity?"

3. Do the principles of federalism, comity, and judicial efficiency that underlie the jurisdictional bar require a federal court plaintiff to exhaust readily available collateral proceedings for setting aside a state court judgment before he may raise in federal court constitutional issues he could have raised in state court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STYLE OF CASE	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT IN SUPPORT OF GRANTING WRIT	6
I. THE DECISION OF THE COURT OF APPEALS VIOLATES THE PRINCIPLES ARTICULATED IN THE <i>ROOKER</i> DOC- TRINE.	6
II. APPELLEES HAD AMPLE OPPORTUNITY TO RAISE CON- STITUTIONAL CHALLENGES TO THE WAIVER OF NOTICE PROVISION.	11
A. Appellees Were The Subject Of Ongoing State Court Proceedings When The Actions Com- plained Of Occurred And Could Have Raised Their Constitutional Claims In The State Proceedings.	11
B. Appellees Were At All Pertinent Times Repre- sented By Counsel Who Could Have Raised Their Constitutional Claims.	14
C. The Court Of Appeals Has Misconstrued The Effect Of Appellees' Opportunity To Seek Re- view Of The Judgment In State Court By Use Of Rule 1.540, Florida Rules Of Civil Proce- dure.	15
CONCLUSION	19
CERTIFICATE OF SERVICE	21
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	14a

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:	Page
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980)	9, 10
<i>District of Columbia, Court of Appeals v. Feldman</i> , — U.S. —, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)	5, 6, 7, 10, 11, 16, 17, 19, 20
<i>Polk Court v. Dodson</i> , 454 U.S. 312 (1981)	14
<i>Rooker v. Fidelity Trust Co.</i> , 263 U.S. 413 (1923)	5, 6, 7, 11, 16, 17
<i>Sumner v. Mata</i> , 449 U.S. 539 (1981)	9
<i>Swain v. Pressley</i> , 430 U.S. 372 (1977)	10
OTHER FEDERAL CASES:	
<i>Almon v. Sandlin</i> , 603 F.2d 503 (5th Cir. 1979)	17
<i>Davis v. Page</i> , 640 F.2d 559 (5th Cir. 1981)	9
<i>Gresham Park Community Org. v. Howell</i> , 652 F.2d 1227 (5th Cir. 1981)	9
<i>Kimball v. The Florida Bar</i> , 632 F.2d 1283 (5th Cir. 1980)	8
<i>Lampkin-Asam v. Supreme Court of Florida</i> , 601 F.2d 760 (5th Cir. 1979)	8
FLORIDA CASES:	
<i>American Agronomics Corp. v. Varner</i> , 413 So.2d 484 (Fla. 2d DCA 1982)	17
<i>Benton v. State</i> , 440 So.2d 493 (Fla. 2d DCA 1983)	13, 14
<i>County National Bank of North Miami Beach v. Sher- idan, Inc.</i> , 403 So.2d 502 (Fla. 4th DCA 1981) ...	17
<i>Gryca v. State</i> , 315 So.2d 221 (Fla. 1st DCA 1975) ..	12, 14
<i>Drumm v. State</i> , 432 So.2d 765 (Fla. 2d DCA 1983)	13, 14
<i>Northshore Hospital, Inc. v. Barber</i> , 143 So.2d 849 (Fla. 1962)	18
<i>Parish Mortgage Corp. v. Davis</i> , 251 So.2d 342 (Fla. 3d DCA), cert. denied, 254 So.2d 789 (Fla. 1971)	18
<i>Reizen v. Florida National Bank at Gainesville</i> , 237 So.2d 30 (Fla. 1st DCA 1970)	15

Table of Authorities Continued

	Page
<i>Smith v. Garth</i> , 289 So.2d 774 (Fla. 2d DCA 1974) ...	18
<i>State v. Grooms</i> , 389 So.2d 313 (Fla. 2d DCA 1980) ..	15
<i>Tucker v. Dianne Elec., Inc.</i> , 389 So.2d 683 (Fla 5th DCA 1980)	18
<i>Woldarsky v. Woldarsky</i> , 243 So.2d 629 (Fla 1st DCA 1971)	18
FLORIDA STATUTES:	
Chapter 27, <i>Fla. Stat.</i> (1981)	8
FLORIDA RULES:	
Rule 1.540, Florida Rules of Civil Procedure	9, 11, 15, 16, 17, 18, 19

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Petitioners, Orange County, Florida and Kenneth Kienth pray that a Writ of Certiorari issue to review the judgments of: (1) the decision of the United States Court of Appeals, Eleventh Circuit, entered on September 30, 1983 in *Wood v. Orange County*, Case No. 81-6176; and (2) the Order of the United States District Court, Middle District of Florida, entered on August 31, 1981 in *Wood v. Carls*, Case No. 79-408-ORL.-Civ-R.

OPINIONS BELOW

The United States Court of Appeals, Eleventh Circuit has issued an opinion in this case, a copy of which appears in appendix "A" to this petition at page 1a, which is not yet reported.

The United States District Court, Middle District of Florida, has issued an order, a copy of which appears in appendix "B" to this petition at page 11a.

JURISDICTION

The decision of the United States Court of Appeals, Eleventh Circuit was entered on September 30, 1983. After receiving an extension of time, Orange County filed a Petition for Rehearing and Suggestion for Rehearing En Banc on October 29, 1983. On November 17, 1983, the court denied Orange County's Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On September 22, 1977, BEATRICE S. WOOD signed a form entitled an "Affidavit of Insolvency." (R.O.A. 376). At the time she signed the affidavit WOOD was a party defendant to an ongoing criminal state court action. (R.O.A. 366). Included on the same form as the affidavit was an order, which was signed that same day by a judge in the Ninth Judicial Circuit, State of Florida, appointing a public defender to represent WOOD. (R.O.A. 376).

The "Affidavit of Insolvency" form also contained the following language:

"Affiant further says that he has been informed that a lien, for the value of the services rendered him by the (Public Defender) (Orange County Bar Association), may be filed and impressed by law on any property he now has, or may hereafter have, within or without the State of Florida, and he hereby waives notice of any proceedings at which the costs or value of the services of the (Public Defender) (Orange County Bar Association) as aforesaid, may be determined, and further waives any notice of filing of the aforesaid lien at any time."

On January 3, 1978, a court order impressed a lien in the amount of \$100.00 against WOOD for her use of the court appointed public defender. (R.O.A. 377). The record does not reveal whether WOOD personally participated in or personally received notice of the date of the hearing on January 3, 1978. However it is clear that her counsel was involved in the proceedings resulting in the entry of the order. (R.O.A. 367, 377).

On October 13, 1977, SANDRA RITTER signed an "Affidavit of Insolvency" form identical to the one signed by WOOD. (R.O.A. 379). On that same day, a private lawyer and member of the Orange County Bar Association was ordered by a judge in the Ninth Judicial Circuit, State of Florida, to represent RITTER. (R.O.A. 379). RITTER, like WOOD, was the subject of an ongoing criminal proceeding at the time she signed the affidavit. (R.O.A. 368). On January 23, 1978, a court order impressed a lien in the amount of \$211.65 against RITTER for her use of the court appointed attorney. (R.O.A. 380). As in WOOD'S situation, the record is silent as to whether RITTER personally participated in or personally received notice of the hearing during which the lien was impressed against her. RITTER'S attorney did, however, participate in those proceedings. (R.O.A. 380).

WOOD and RITTER received notice of the award of attorneys' fees against them in collection letters sent to them by a collection agency on November 22, 1978 and December 6, 1978, respectively. (R.O.A. 367, 369, 378, 381) WOOD, on December 29, 1983, actually paid \$10.00 in partial discharge of her obligations on the court order. (R.O.A. 14) At no time prior to filing a federal court action did either WOOD or RITTER attempt to appeal the court orders signed by the state court or to have those orders vacated.

Instead, WOOD and RITTER filed a class action complaint in federal district court on August 9, 1979. The complaint was amended on August 27, 1979, and again amended on February 5, 1980. (R.O.A. 1, 354). The amended complaint sought a declaration that portions of Chapter 27, *Florida Statutes* dealing with public defender liens were unconstitutional. It also sought restitution of all monies collected by ORANGE COUNTY pursuant to the public defender lien law. (R.O.A. 354).

On February 28, 1980, ORANGE COUNTY and KIENH filed a Motion to Dismiss Second Amended Complaint. On that same date WOOD and RITTER filed a Motion for Partial Summary Judgment. (R.O.A. 410). The Motion for Partial Summary Judgment was denied by order and memorandum of the district court on March 17, 1981. (R.O.A. 430, 435). The order and memorandum stated that the court did not have subject matter jurisdiction due to the jurisdictional bar that precludes a federal court from acting as an appellate court to review state court decisions. (R.O.A. 430, 435). Despite ruling that it lacked jurisdiction, on July 22, 1981, the court heard Defendants' Motion to Dismiss, which, among other things, questioned the subject matter jurisdiction of the district court. Instead of granting the motion to dismiss for lack of subject matter jurisdiction, the district court denied the motion by order and memorandum filed on September 1, 1981. (R.O.A. 440).

In its order denying the motion to dismiss, the district court determined that "this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation." (R.O.A. 440). Permission to appeal was sought on September 10, 1981, and was granted on

December 7, 1981. (R.O.A. 452). On September 30, 1983, the United States Court of Appeals, Eleventh Circuit affirmed, with opinion, the lower court's decision that it had jurisdiction.

In its opinion, the Court of Appeals recognized that this Court's decision in *District Court of Columbia, Court of Appeals v. Feldman*, ___ U.S. ___, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), "breathed new life into the *Rooker* Doctrine as traditionally conceived," and that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this court." The Court of Appeals also noted that according to the *Feldman* decision, the *Rooker* Bar precludes a lower federal court from considering federal issues that are raised in state proceedings and are "inextricably intertwined" with the state court's judgment as well as federal claims which a plaintiff failed to raise in previous state court proceedings.

After summarizing this Court's holding in *Feldman*, the Court of Appeals proceeded to assert that the *Rooker* Bar, as reiterated by *Feldman*, "can apply only to issues that the plaintiff had a reasonable opportunity to raise." Having added this caveat to the *Feldman* and *Rooker* decisions, the Court of Appeals then reviewed the Record and determined that "reasonable opportunity" to raise issues in the state court system did not exist for WOOD and RITTER. The Court of Appeals found no reasonable opportunity for WOOD and RITTER to raise federal constitutional issues in the state court system in spite of the fact that the procedures complained of occurred in an ongoing state court proceeding. (App. A). The Court of Appeals also found that WOOD and RITTER had no reasonable opportunity to challenge state court proce-

dures where their lawyers had notice of and were involved in the state court procedures at issue. Finally, the Court of Appeals held that it made no difference that WOOD and RITTER had an opportunity to raise issues in a state court collateral attack on the complained of court procedures that gave rise to this case. The Court of Appeals reasoned that it did not make any difference that a federal court might perform the same role as a state court, because *Rooker* only precluded that from occurring where the duplication of effort involved appellate review.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS VIOLATES THE PRINCIPLES ARTICULATED IN THE *ROOKER* DOCTRINE.

This Court has articulated in many opinions the premise that principles of federalism, comity, and judicial efficiency dictate that federal courts and state courts must work with one another. In 1923, this Court, in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), held that a federal district court has no jurisdiction to review a state court judgment. The decision that this Court made in *Rooker* has been consistently followed. It was most recently reaffirmed by this Court in *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

In *Feldman*, the Court created a limited exception to the jurisdictional bar articulated in *Rooker*. The Court held:

United States District Courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case. *They do not have jurisdiction, however, over challenges to*

state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Id. 75 L.Ed. 2d at 225. (Emphasis added).

The instant case is an appeal directly arising out of state court judicial proceedings that are alleged to be unconstitutional. WOOD and RITTER represent a class of people who have alleged that the state court judicial use of an "Affidavit of Insolvency" and the subsequent lack of *actual personal* notice of a hearing and of entry of a judgment is unconstitutional. This Court's decision in *Feldman* should have acted to bar WOOD and RITTER's claims. Instead the Court of Appeals created an exception to the decisions of this Court and allowed federal court jurisdiction.

The Court of Appeals, even while citing *Feldman* and *Rooker*, proceeded to modify those decisions by determining that the jurisdictional bar would not apply unless a party had been granted a "reasonable opportunity" to raise federal constitutional challenges in state court proceedings. No decision of this Court, or any Circuit Court, grants or recognizes such an exception.

The Court of Appeals examined the record before it and found that WOOD and RITTER had no "reasonable opportunity" to appeal the complained of state court proceedings. Thus, the Court of Appeals reasoned that the *Rooker* bar to jurisdiction should not apply.

Two major problems exist with the Court of Appeal's decision. First, the Court of Appeals has created a jurisdictional avenue which this Court has consistently held not to be available. Second, the Court of Appeals has construed a lack of "reasonable opportunity" to raise state court issues in such a way as to open wide the door to federal court relitigation of state court proceedings.

As previously argued, this Court clearly reaffirmed the *Rooker* bar to federal court review of state court judgments. Stripped to its essentials, the amended complaint filed by WOOD and RITTER for declaratory and injunctive relief asks the federal district court to reverse a final, definitive state court order. All general attacks made by Plaintiffs against either the "Affidavits of Insolvency" attached to the Amended Complaint as Exhibits "A" and "B" or Chapter 27, *Fla. Stat.*, are moot or illusory. The "Affidavits of Insolvency" are no longer used in the Ninth Circuit of Florida. Chapter 27, *Fla. Stat.* (1981), no longer requires a court to assess attorneys' fees against a defendant. Instead, it now permits a court to do so. Therefore, the only challenge Plaintiffs can raise is to the constitutionality of the procedures involving the particular affidavits that were used against them and the previous wording of Chapter 27 as applied to them. Those issues are inextricably intertwined with the liens imposed by the state court against Plaintiffs. The affidavits which WOOD and RITTER signed were presented to them as part of an ongoing state court criminal proceeding. The constitutionality of the affidavits and Chapter 27, as applied to Plaintiffs, should have been completely resolved when Plaintiffs failed to contest their constitutionality in the original state court proceedings and failed either to appeal the judgment entered against them or to seek to have that judgment set aside.

The state court order now represents a binding final order. As federal case law recognizes: "[i]t is axiomatic that a federal district court, as a court of original jurisdiction lacks appellate jurisdiction to review, modify or nullify a final order of a state court." 28 U.S.C. § 1257(3); *Kimball v. The Florida Bar*, 632 F.2d 1283 (5th Cir 1980); *Lampkin-Asam v. Supreme Court of Florida*, 601 F.2d 760 (5th Cir. 1979). Moreover, district courts have no

more power to review the decision of lower state courts than those of state Supreme Courts. *Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1234 n.14 (5th Cir. 1981).

In *Allen v. McCurry*, 449 U.S. 90, 102 (1980), this Court rejected the "principle that every person asserting a federal right is entitled [either by the United States Constitution or by 15 U.S.C. § 1983] to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." This principle was further articulated by the Fifth Circuit in *Davis v. Page*, 640 F.2d 559, 601 (5th Cir. 1981). In that case the court granted jurisdiction only after noting that at the time Plaintiff filed her federal action adjudicatory proceedings had been completed and she "had exhausted the remedies available to her under Florida law." In the instant case Plaintiffs, far from exhausting remedies available to them, have not availed themselves of filing an appeal or a Rule 1.540, Florida Rules of Civil Procedure, motion to set aside a judgment they now allege was improvidently or unconstitutionally granted.

In reaching its decision, the Court of Appeals relied heavily on this Court's ruling in *Feldman*, *supra*. While purporting to rely on *Feldman*, however, the court's opinion has the potential for subverting much of the public policy rationale advanced in that decision. In *Feldman*, the Court noted:

By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competency of state courts to adjudicate federal constitutional claims. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 549 (1981); *Allen v. McCurry*,

449 U.S. 90, 105 (1980); *Swain v. Pressley*, 430 U.S. 372, 383 (1977). We also noted in *Cardinale* that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. 394 U.S. at 439. *Id.* at 1315 n.16.

Thus, the purpose in denying federal district court jurisdiction to entertain questions that should have been raised in a state court is not simply to prevent the federal courts from serving as courts of appeal from state court decisions, but also to give state courts the first opportunity to rule on the federal constitutionality of its own statutes and rules. It is a policy based on considerations of comity, federalism and respect for the competency of state courts.

In order for such a policy to be effective, federal courts must be willing to reject suits from plaintiffs who, like WOOD and RITTER, make no effort to present federal constitutional challenges in state court proceedings. Otherwise, parties will be encouraged to avoid raising such issues in state court, so that they may enjoy the luxury of forum shopping for a supposedly more receptive federal court or having the same issue adjudicated in both federal and state courts. Only in rare instances, as when the state courts themselves preclude raising such challenges, should federal courts open their doors to claims like those presented in the instant litigation.

Although the Court of Appeals reiterated the reasoning of this Court in *Feldman* that a federal district court may not assume jurisdiction over issues that a plaintiff failed to present in a state court, it added the caveat, "unless a plaintiff had no reasonable opportunity to raise such issues in state court." At first blush the caveat

formulated by the Court of Appeals appears reasonable and not inconsistent with *Feldman*. If state court proceedings preclude a party from raising federal constitutional claims, federal courts will normally be available to hear those claims. The difficulty with the Court of Appeals' decision is its conclusion that "reasonable opportunity" (1) is achieved only when one personally, not constructively through his attorney, is notified of a hearing; (2) is limited exclusively to the original hearing and appeals thereto and does not include readily available procedures for setting aside default judgments.

The fact that WOOD and RITTER were represented by counsel from the time they signed affidavits to the time the order in question was issued (R.O.A. 367, 376, 377), the fact that they were involved in a criminal proceeding at the time they signed the affidavits (R.O.A. 366, 368), and the fact that they could have reasonably moved to vacate the order pursuant to a motion under Rule 1.540, Florida Rules of Civil Procedure, were all dismissed by the Court of Appeals as not being "reasonable opportunities." By so narrowly defining "reasonable opportunity," the Court of Appeals denied Florida courts an opportunity to first consider the constitutional questions at issue and unnecessarily subverted the public policies underlying the *Feldman* and *Rooker* decisions.

II. APPELLEES HAD AMPLE OPPORTUNITY TO RAISE CONSTITUTIONAL CHALLENGES TO THE WAIVER OF NOTICE PROVISION.

A. Appellees Were The Subject Of Ongoing State Court Proceedings When The Actions Complained Of Occurred And Could Have Raised Their Constitutional Claims In The State Proceedings.

The Court of Appeals in its opinion mistakenly suggests that "when plaintiffs signed the affidavits, lien

proceedings had not yet commenced. Indeed, there were no ongoing state proceedings in which plaintiffs could have raised and received a judicial determination of their constitutional claims." This statement ignores the fact that at the time they signed the affidavits, WOOD and RITTER were already the subject of state court action. (R.O.A. 366, 368). They had already been charged with criminal acts. When first asked to sign the affidavits, WOOD and RITTER had but to refuse to sign them in order to challenge their constitutionality. Had they been denied the services of a Public Defender for failure to sign the affidavits, WOOD and RITTER would have been able to assert that they had been denied effective assistance of counsel. They would thereby have been able effectively to challenge the waiver of notice provisions contained in the affidavits.

Even had WOOD and RITTER not refused to sign the affidavits, they could still have used the criminal proceedings as a forum to challenge the constitutionality of the affidavits. As their representative, the Public Defender could have raised all the issues they now would have the federal courts consider. Instead, WOOD and RITTER, through the Public Defender, permitted the criminal proceedings to run their course without ever attempting to challenge the affidavits. The Court of Appeals thus erred in its opinion when it stated that "there were no ongoing state proceedings in which plaintiffs could have raised and received a judicial determination of their constitutional claims."

The Ninth Judicial Circuit in Florida is not the only Circuit in Florida to use some form of an "Affidavit of Insolvency." In fact, the constitutionality of the use of such forms has been addressed by several courts in Florida. See, *Gryca v. State*, 315 So.2d 221 (Fla. 1st DCA

1975); *Drumm v. State*, 432 So.2d 765 (Fla. 2d DCA 1983); *Benton v. State*, 440 So.2d 493 (Fla. 2d DCA 1983). In *Benton*, *supra*, for example, an order assessing attorneys' fees was entered by the court five months after sentencing. Defendant, therein, filed a notice of appeal pro se and a public defender was appointed to argue the case before a Florida District Court of Appeal. (See Copy of Initial Brief of Appellant attached hereto as Appendix C). The District Court of Appeal found that appellant had been denied an opportunity to be heard. Accordingly, the Court reversed and remanded so that proper notice and an opportunity to be heard on the fees could be granted. Because the federal district court prematurely intervened in the instant case, there has been no rehearing and no appeal of the matter. Nor will it be possible to properly remand the matter to the trial court so that notice and an opportunity to be heard on the fees can be granted.

The Court of Appeals has opened Pandora's Box. It is apparent that the use of forms waiving a right to a hearing on attorneys' fees is, or was, widespread in Florida. At least three criminal defendants have appealed the use of such forms and been given opinions by appellate courts on the propriety of using such forms. Nevertheless, the Eleventh Circuit Court of Appeals has now told, by its most recent opinion, all criminal defendants in Florida who signed the forms and did not receive *actual personal* notice of the hearing that they may turn to federal courts for relief. The potential outcome of the Court of Appeals' ruling is that Florida courts will be deprived of an opportunity to correct a potential procedural defect that is purely local in origin. Moreover, judgments may become void with no opportunity for the state trial court, having corrected the procedural defects, to impose reasonable fees for services provided by a public defender. The

federal court system in the instant case has thus usurped the role of a state appellate court without even possessing the authority to grant the full relief Florida courts have already provided in *Gryca*, *Drumm*, and *Benton*. The *Rooker* Doctrine was formulated in large part to avoid such situations. The validity of that Doctrine has been proved. The Doctrine cannot remain viable, however, unless the decision of the Court of Appeals is reversed.

B. Appellees Were At All Pertinent Times Represented By Counsel Who Could Have Raised Their Constitutional Claims.

In its opinion, the Court of Appeals failed to note a number of pertinent facts contained in the Record on Appeal concerning the litigation with WOOD and RITTER. In the first place, it should be emphasized that they were at all times represented by counsel. The Public Defender, or Special Public Defender in the case of RITTER, was never dismissed as attorney of record and acted in that capacity throughout the state court proceedings. (R.O.A. 367, 377, 380). He could have raised in state court the issues now raised by WOOD and RITTER in federal court. Although the lien was imposed to recover fees for services provided by the Office of the Public Defender, the individual public defenders had an obligation to represent the interests of WOOD and RITTER, not the Office of the Public Defender. Public defenders are held to the same standards as private attorneys and they work under canons of professional responsibility that require them to exercise independent judgment on behalf of their clients. *See, Polk Court v. Dodson*, 454 U.S. 312 (1981).

The public defenders participated in the proceedings which resulted in the orders wherein liens were impressed against WOOD and RITTER. (R.O.A. 367, 368,

377, 379) They had notice of the proceedings. Because the public defenders had notice, WOOD and RITTER constructively and legally had notice. Florida case law clearly establishes that papers served upon a party's attorney where a cause is pending or has not yet been concluded are regarded as validly served. *Reizen v. Florida National Bank at Gainesville*, 237 So.2d 30 (Fla. 1st DCA 1970). More to the point, in *State v. Grooms*, 389 So.2d 313 (Fla. 2d DCA 1980), the court held that as long as neither the proceedings nor the Public Defender's representation of a client have been terminated, notice of a trial date to a Public Defender serves as notice of that date to the client. By analogy, when the public defenders participated in the process resulting in the imposition of the liens in question, that notice had to be imputed to WOOD and RITTER.

The public defenders had an opportunity to raise in state court the very claims WOOD and RITTER have now attempted to raise in federal court. When they failed to do so, regardless of their reasons, their clients lost their right to raise those issues in federal court. If this were not the case, attorneys would be encouraged to keep their clients "in the dark" and avoid raising constitutional issues at the state court level in order to allow clients to subsequently seek review by federal district courts.

C. The Court Of Appeals Has Misconstrued The Effect Of Appellees' Opportunity To Seek Review Of The Judgment In State Court By Use Of Rule 1.540, Florida Rules Of Civil Procedure.

Perhaps the most serious misapprehension of the law and facts committed by the Court of Appeals was its analysis of WOOD and RITTER's failure to utilize Rule 1.540, Florida Rules of Civil Procedure. The Rule provides broad grounds for setting aside judgments within a year of the time they are entered. In the first place, the

court noted that "even assuming Appellees' claims were cognizable on a 1.540 motion for relief from judgment, the *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), bar would not apply because the Court in deciding such a motion does not act as an appellate court." According to the Court of Appeals:

"Because Rule 1.540 proceedings are not part of the process of appellate review of the original judgment, it does not matter for purposes of *Rooker* that plaintiffs could have raised their claims in such proceedings. The federal court may perform a role that a state court deciding a Rule 1.540 motion might also be able to perform. But the federal court is not usurping the role of a state appellate court because a state court deciding a Rule 1.540 motion does not act as an appellate court."

This interpretation is a misstatement of the appropriate uses of Rule 1.540 and a misconstruction of *Feldman*, *Rooker*, and all other cases discussing the law of federal jurisdictional.

The above language found in the Court of Appeals' opinion resulted in the court taking inconsistent postures with respect to the instant case. Having first created an exception to the *Rooker* and *Feldman* jurisdictional bar for litigants who had "no reasonable opportunity" to raise federal constitutional claims in state court, the Court of Appeals then restricted application of the "reasonable opportunity" doctrine to the appeal process. According to the Court, the fact that WOOD and RITTER may have had an opportunity to raise the federal constitutional issues by motion under Rule 1.540 in the state court proceedings made no difference, because "Rule 1.540 proceedings are not part of the process of the appellate review of the original judgment." The Court of Appeals' decision subverts the goal of federal court noninterference with state court proceedings.

Two things are wrong with the Court of Appeals' analysis. First, if the central issue is one of assuring "reasonable opportunity," it does not make any difference whether Rule 1.540 is a part of the Florida court's process of appellate review. Second, a Rule 1.540 motion may, in fact, be used in Florida to start the appellate review process.

Although it is true, as the Court of Appeals pointed out in its opinion, that *Rooker* does not require a state court litigant to exhaust all opportunities to raise his constitutional issues in state court, numerous other decisions, not in conflict with *Rooker*, do make that a requirement. *Feldman*, upon which the Court of Appeals bases much of its opinion, recognizes this fact when it notes that "review of a state court decision by this Court could be barred by a petitioner's failure to raise his constitutional claims in the state courts." *Feldman, supra*, at 4291. Similarly in *Almon v. Sandlin*, 603 F.2d 503 (5th Cir. 1979), the court found that after Almon failed to object to a statute's unconstitutionality in state court proceedings, the district court's dismissal for lack of jurisdiction was proper, because Almon waived the issue by failing to raise it.

The Court of Appeals also failed to recognize the scope of filing a Rule 1.540 motion for review within the Florida courts. A Florida court is accorded broad discretion to grant Rule 1.540 motions, particularly in the event of judgments entered without notice to a party. Moreover, Florida courts have traditionally recognized that rules of procedure should always be construed liberally when considering motions to vacate judgments so as to achieve substantial justice. *County National Bank of North Miami Beach v. Sheridan, Inc.*, 403 So.2d 502 (Fla. 4th DCA 1981). See also, *American Agronomics Corp. v.*

Varner, 413 So.2d 484 (Fla. 2d DCA 1982). Thus, if there is any reasonable doubt in the matter of vacating a judgment entered without an appearance by a party, it should be resolved in favor of granting the motion and allowing a trial upon the merits. *Northshore Hospital, Inc. v. Barber*, 143 So.2d 849 (Fla. 1962). Florida case law also recognizes that a Rule 1.540 motion is an appropriate way to challenge void judgments. See, *Tucker v. Dianne Elec., Inc.*, 389 So.2d 683 (Fla. 5th DCA 1980); *Parish Mortgage Corp. v. Davis*, 251 So.2d 342 (Fla. 3d DCA), cert. denied, 254 So.2d 789 (Fla. 1971). For these reasons, a Rule 1.540 motion would have been an appropriate way for WOOD and RITTER to challenge the initial entry of judgment against them.

Most importantly, contrary to what the Court of Appeals ruled, Florida case law clearly establishes that a Rule 1.540 motion may serve as an appropriate vehicle for initiating an appeal process. In *Woldarsky v. Woldarsky*, 243 So.2d 629 (Fla. 1st DCA 1971), the court considered a situation similar to the instant one. There, final judgment was entered in a divorce case on July 15, 1970. On August 21, 1970, appellant filed a Rule 1.540 motion to set aside final judgment, alleging that he had received no notice that the final judgment had been rendered on July 15 and that no copies thereof had been served upon him. His motion to vacate stated that the sole purpose of his motion was so that final judgment could be re-entered, only this time with "a fresher date" so that he could take an appeal therefrom. The trial court initially granted the motion, then reversed itself. On appeal, the First District Court of Appeal recognized that the trial court was authorized to set aside its original order and re-enter the same with a later date so that appellant would have an opportunity to appeal the order. See also, *Smith v. Garth*, 289 So.2d 774 (Fla. 2d DCA 1974).

The Woldarsky procedure could readily have been followed in the instant case. Having learned within eleven (11) months of the entry of the order that the lien would be enforced, WOOD and RITTER still had over thirty (30) days to file a 1.540 motion. The trial court could thereupon have vacated the order and permitted them full opportunity to challenge the constitutionality of the waiver of notice provision of the affidavit. In the alternative, the trial court could have simply entered a new date on its order, thereby permitting WOOD and RITTER to initiate a state court appellate process. By permitting WOOD and RITTER to precipitously seek its assistance, however, the federal district court effectively eliminated such reasonable opportunities and denied Florida courts their right to consider the federal constitutionality of local court procedures.

CONCLUSION

The importance of *Feldman* is that it reiterates the desirability of giving state courts the first opportunity to consider state statutes, rules, or judicial procedures in light of federal constitutional challenges. Such a goal logically and by the weight of case law is not limited to the appeal process. WOOD and RITTER had full opportunity, through the Public Defender, to use the criminal proceedings in which they participated to challenge the constitutionality of the judicial procedures governing the imposition of liens. After their relationship with the Public Defender ended, they still had full opportunity to use a Rule 1.540 motion to achieve the same result and even to initiate appellate consideration of the issues. They should have been required to avail themselves of those opportunities. Appellees should not have been granted a right to resort to federal courts without having first attempted to make use of the available state procedures. By its deci-

sion in the instant case, the Court of Appeals has subverted the policies underlying the *Feldman* decision. As a result, parties like WOOD and RITTER will be encouraged not to raise federal constitutional challenges in state courts, so that they may have a second opportunity to litigate the same issues before a federal court. Neither comity, federalism nor judicial efficiency will be well served by such a result.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.

Sept. 30, 1983.

No. 81-6176.

Beatrice S. WOOD and Sandra Surburg Ritter,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

ORANGE COUNTY and Kenneth Kienth,
Defendants-Appellants.

Appeal from the United States District Court for the Middle
District of Florida.

Before GODBOLD, Chief Judge, RONEY, Circuit Judge,
and PITTMAN*, District Judge.

GODBOLD, Chief Judge:

This suit arises out of liens entered against plaintiffs Sandra Ritter and Beatrice Wood in Florida courts, and pursuant to a Florida statute, for the value of legal services provided them in criminal cases by a state public defender. Plaintiffs allege that the liens were entered in violation of their due process rights; defendants Orange County and Kenneth Kienth, comptroller of Orange County, seek to enforce the liens.

We must decide in this interlocutory appeal whether the district court has subject matter jurisdiction over plaintiffs' suit. The district court denied defendants' motion to dismiss

*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

for want of jurisdiction but, noting a conflict in the governing precedent, certified the jurisdictional question for interlocutory appeal. We hold that the district court has subject matter jurisdiction and remand.

Plaintiffs were defendants in separate criminal cases brought in the state courts of Orange County, Florida. The court adjudged plaintiffs insolvent in each case and appointed an attorney from the Orange County public defender's office to represent plaintiffs. Plaintiffs signed affidavits of insolvency containing a waiver clause, which informed plaintiffs of the possibility that a lien would be impressed against their property for the value of services rendered by the public defender. A Florida statute provides that the person against whom the lien is sought shall have notice, appointed counsel, an opportunity to be heard, and other procedural rights, *see* Fla.Stat.Ann. § 27.56(7) (West Supp.1983), but the waiver stated that plaintiffs waived notice of any lien proceedings.

After the criminal cases were over, the court entered liens against Wood and Ritter for \$100 and \$211 respectively. Neither plaintiff had notice of or participated in the lien proceedings. Plaintiffs allege that they first received notice of the liens many months later when contacted by a collection agency employed by Orange County. Thereafter plaintiffs filed suit in federal district court alleging due process violations and requesting injunctive and declaratory relief.

Defendants vigorously contend that the district court has no subject matter jurisdiction over plaintiffs' suit, citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and a long line of Fifth Circuit precedent holding that a federal district court has no jurisdiction to review a state court judgment. According to defendants, plaintiffs had an opportunity to raise constitutional objections to the lien procedure at several stages of state proceedings. The state court proceedings, they argue, are thus dispositive of plaintiffs' constitutional claims, and the plaintiffs' sole federal recourse was to ask the United States Supreme Court to review the state decisions creating the liens.

In *Rooker* the parties first litigated their dispute in Indiana courts. After the Indiana Supreme Court issued its decision and the United States Supreme Court denied review, one of the parties filed suit in federal district court, arguing that the state decision rested on an unconstitutional state statute. Addressing the issue of the federal district court's subject matter jurisdiction, the unanimous Court held that the district court lacked jurisdiction to correct errors of federal law allegedly made by state courts in the exercise of their jurisdiction. *Id.* at 415, 44 S.Ct. at 150. The Court identified two statutory bases for its decision. First, it noted that it has exclusive authority to review decisions of a state supreme court for alleged errors of federal law. *Id.* at 416, 44 S.Ct. at 150; see 28 U.S.C. § 1257 (1976). Second, the Court reasoned that the requirement that the district court exercise "original" jurisdiction prevents the district court from, in effect, reviewing state court decisions. *Id.* at 416, 44 S.Ct. at 150; see 28 U.S.C. § 1331 (Supp. V 1981). See generally Change, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 Hastings L.J. 1337, 1346 (1980).

Consistent with *Rooker*, a long line of former Fifth Circuit cases has held that federal district courts have no jurisdiction to review, overturn, or modify state court judgments. See, e.g., *Kimball v. Florida Bar*, 632 F.2d 1283 (5th Cir.1980); *Lampkin-Asam v. Supreme Court*, 601 F.2d 760 (5th Cir.1979), cert. denied, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980); *Sawyer v. Overton*, 595 F.2d 252 (5th Cir.1979); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir.1969), cert. denied, 397 U.S. 951, 90 S.Ct. 976, 25 L.Ed.2d 134 (1970).

In *Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981) (Unit B), the former Fifth Circuit qualified the scope of *Rooker* and rejected much of its progeny. The court discussed several Supreme Court cases in which the Court implicitly held that the district court had jurisdiction despite the fact that *Rooker* would have precluded jurisdiction. *Id.* at 1234. The court also identified a line of Fifth Circuit cases in conflict with the cases cited above that follow *Rooker*. *Id.* at

1234-35. It resolved the conflict by rejecting the broad proposition, expressed in these latter cases, that the federal district courts have no jurisdiction to entertain a claim made by a losing party in state court that would nullify or modify the state court decision. *Id.* at 1235-36. Further, *Gresham* reinterpreted *Rooker* to stand only for the truism that federal district courts cannot exercise jurisdiction where federal question or diversity of citizenship jurisdiction is lacking. *Id.* at 1236.

Gresham's limiting interpretation of *Rooker* was shortlived. While normally we would be bound by *Gresham*, the Supreme Court's intervening decision in *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), breathed new life into the *Rooker* doctrine as traditionally conceived. In *Feldman* plaintiffs filed petitions with the District of Columbia Court of Appeals, seeking waiver of the D.C. bar's requirement that members graduate from accredited law schools. In each case the D.C. Court of Appeals, the equivalent of the highest court of a state, denied the petition. The plaintiffs then brought suit in federal district court, challenging as a violation of federal law the D.C. Court of Appeals' refusal to waive the accreditation requirement.

In determining whether the federal district court had subject matter jurisdiction, the Supreme Court cited *Rooker* for the proposition that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court." *Id.* ___ U.S. at ___, ___, 103 S.Ct. at 1311, 1314, 75 L.Ed.2d at 218, 222 (citing *Rooker*, 263 U.S. at 415, 416, 44 S.Ct. at 150). Applying this general principle to the case before it, the Court distinguished between plaintiffs' challenge to the accreditation rule as applied to them and their general attack on its constitutionality. *Id.* ___ U.S. at ___-___, 103 S.Ct. at 1315-16, 75 L.Ed.2d at 223-24. It held that the federal district court had no jurisdiction over the plaintiffs' allegation that the D.C. Court of Appeals had arbitrarily denied their waiver petitions. *Id.* ___ U.S. at ___, 103 S.Ct. at 1316-17, 75 L.Ed.2d at 225. It characterized the court of appeals' decision

as judicial and stated that the plaintiffs' allegation was "inextricably intertwined" with that court's decision. *Id.* By assuming jurisdiction over this allegation, the Court explained, the district court would be "review[ing] a final judicial decision of the highest court of a jurisdiction in a particular case." *Id.* In contrast, the Court held that the district court could properly assume jurisdiction over the plaintiffs' broadside challenge to the constitutionality of the accreditation requirement because this general challenge did not "require review of a judicial decision in a particular case." *Id.* ____ U.S. at ____-____, 103 S.Ct. at 1316-1317, 75 L.Ed.2d at 225-26.¹

Feldman forthrightly reaffirms the validity of *Rooker*. It reminds the lower federal court that, because federal review of state court decision is entrusted solely to the Supreme Court, they may not decide federal issues that are raised in state proceedings and "inextricably intertwined" with the state court's judgment. *Id.* ____ U.S. at ____, 103 S.Ct. at 1316-17, 75 L.Ed.2d at 225. *Feldman*, moreover, indicates that the *Rooker* bar also operates where the plaintiff fails to raise his federal claims in state court. In a footnote the Court rejected a Fifth Circuit case holding that *Rooker* applies only to issues actually raised, *Id.* ____ U.S. at ____ n. 16, 103 S.Ct. at 1315 n. 16, 75 L.Ed.2d at 223 n. 16 (rejecting *Dasher v. Supreme Court*, 658 F.2d 1045 (5th Cir.1981) (Unit A)). The Court stated: "By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." ____ U.S. at ____ n. 16, 103 S.Ct. at 1316 n. 16, 75 L.Ed.2d at 223 n. 16. Although at first blush the Court's apparent endorsement of the rule that a federal district

¹ Under *Feldman* the district court arguably would have jurisdiction if plaintiffs' action can be characterized as a general challenge to the constitutionality of the practice of requiring indigent defendants to sign an appointment of counsel from waiving all procedural rights with respect to the lien hearing. We need not address this issue because we conclude on other grounds that the district court has jurisdiction.

court may not assume jurisdiction over issues that the plaintiff failed to present to state courts supports defendants' position in this case, there is an important limitation on this rule. The rule can apply only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings. Where the plaintiff has had no such opportunity, he cannot fairly be said to have "failed" to raise the issue. Moreover, an issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case. In *Feldman's* language, the issue that such a plaintiff asks the federal court to decide is not "inextricably intertwined" with the state court's judgment. As a result, the federal district court's jurisdiction does not trench on the exclusive authority of the Supreme Court to review state court decisions for errors of federal law. Stating it another way, because the issue did not figure, and could not reasonably have figured, in the state court's decision, the district court has "original" jurisdiction over the issue as required by 28 U.S.C. § 1331. Finally, interpreting *Rooker* to preclude a federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court might pose due process problems. Such a harsh rule might deprive the plaintiff of any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, a result arguably contrary to the requirements of due process. See *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908). See generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L.Rev. 1362 (1953).

For the foregoing reasons, we hold that the *Rooker* bar can apply only to issues that the plaintiff had a reasonable opportunity to raise.²

² The literal language in some of our prior cases is different from our holding. According to these cases, *Rooker* applies if the effect of a

We apply these principles to the plaintiffs before us.

Defendants contend that plaintiffs had a reasonable opportunity to raise their constitutional objections at three separate stages of state proceedings: (1) when the plaintiffs signed the forms, (2) on appeal of the judgment creating the lien, and (3) on a motion under Fla.R.Civ.P. 1.540. Defendants' arguments are unpersuasive.

First, defendants argue that plaintiffs had an opportunity to raise their constitutional objections when they signed the affidavits containing the waiver clause. It is true that the waiver, if valid, put the plaintiffs on notice of the summary nature of the lien proceedings. It is also true that assuming the plaintiffs had valid notice they could have commenced an action in state court challenging the constitutionality of the lien proceedings. *Rooker*, however, does not preclude the jurisdiction of a federal district court over issues that the plaintiff could have raised in a suit that could have been, but was not, filed in state courts. *Rooker* addresses the effect of state court judgments. The crucial issue, therefore, is whether plaintiffs had a reasonable opportunity to raise their objections in the proceedings where the judgment creating the liens was entered and affirmed. When plaintiffs signed the affidavits, lien proceedings had not yet commenced. Indeed, there were no ongoing state proceedings in which plaintiffs could have raised and received a judicial determination of their constitutional claims.

Second, defendants argue that plaintiffs could have raised their constitutional claims on appeal from the judgment creat-

federal decision favorable to the plaintiff would be to modify or overturn the state judgment. See *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969); see also *Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1233-34 (5th Cir.1981) (Unit B) (stating rule of Fifth Circuit's *Rooker* progeny). So stated, the *Rooker* bar would apply to federal claims arising out of a state court decision whether or not the plaintiff had a reasonable opportunity to raise those claims. For the reasons stated in the text we can no longer follow this mechanical formulation of the *Rooker* doctrine.

ing the lien. Although defendants do not disagree with plaintiffs' allegation that they did not receive actual notice of the judgment until some 11 months after the judgment's entry, defendants contend that plaintiffs must be deemed to have had constructive knowledge of the judgment when it was entered. The cases cited by defendants in support of their argument, e.g., *Texas Gulf Citrus & Cattle Co. v. Kelley*, 591 F.2d 439, 440 (8th Cir.1979), are distinguishable. Those cases stand for the principle that where a party has had notice of proceedings he may be held to have had constructive knowledge of the judgment entered therein. See *id.* The party's constructive knowledge of the entry of judgment is conditioned on his actual notice that proceedings have been instituted against him. Defendants have cited no cases, and we find none, for the proposition that a party may be imputed with constructive knowledge of a judgment entered pursuant to ex parte proceedings of which he has no actual notice. Because plaintiffs did not receive actual notice of the judgment until well after the time for filing an appeal had elapsed, they lacked a reasonable opportunity to appeal the judgment.

Finally, defendants argue that plaintiffs could have raised their objection by filing a Fla.R.Civ.P. 1.540 motion to set aside the final judgment creating the lien. Rule 1.540 provides that a court, upon a motion of a party made within one year of entry of judgment, may relieve a party from the judgment on grounds of, *inter alia*, inadvertence or surprise. Assuming that claims such as the plaintiffs' are cognizable on a Rule 1.540 motion for relief from judgment, the *Rooker* bar does not apply.

A rule 1.540 motion is not a substitute for appeal, and the court deciding such a motion does not act as an appellate court. See *Pompano Atlantis Condominium Association v. Merlino*, 415 So.2d 153, 154 (Fla. Dist. Ct. App. 1982). The rule permits a special kind of collateral attack on, rather than an appeal of, the judgment. *Fiber Crete Homes, Inc. v. Division of Administration*, 315 So.2d 492, 493 (Fla. Dist. Ct. App. 1975). Proceedings surrounding Rule 1.540 are considered separate from those

surrounding entry of the judgment. A denial of a Rule 1.540 motion is, for example, appealable not as the decision of a reviewing court but as a separate judgment in its own right.

Because Rule 1.540 proceedings are not part of the process of appellate review of the original judgment, it does not matter for purposes of *Rooker* that plaintiffs could have raised their claims in such proceedings. The federal court may perform a role that a state court deciding a Rule 1.540 motion might also be able to perform. But the federal court is not usurping the role of a state appellate court because a state court deciding a Rule 1.540 motion does not act as an appellate court. The district court does not violate *Rooker's* rationale by deciding plaintiffs' claims. *Rooker* simply precludes lower federal courts from acting as a state appellate court or as the United States Supreme Court in its capacity as reviewer of state decisions. *Rooker* is not a requirement that a plaintiff exhaust all conceivable state remedies; it does not require that where possible he institute proceedings so that courts can consider the plaintiff's federal claims in the first instance. The important point is that plaintiffs lacked a reasonable opportunity to raise their claims in the proceedings surrounding entry of the judgment.

Since plaintiffs did not have a reasonable opportunity to raise their claims in the state trial court where judgment was entered or on appeal of that judgment, the district court will not usurp the role of state appellate courts or the Supreme Court by accepting jurisdiction. The plaintiffs' allegations were not "inextricably intertwined" with the state court judgment.

Other Issues

Our conclusion that plaintiffs did not have a reasonable opportunity to raise their constitutional claims in the state lien action disposes of defendants' *res judicata* argument. *Res judicata* applies only where the party had such an opportunity. See generally *Durfee v. Duke*, 375 U.S. 106, 111-12, 84 S.Ct. 242, 245-246, 11 L.Ed.2d 186 (1963), and cases cited therein.

Defendants also maintain that they are not proper defendants because they did not cause plaintiffs the allegedly unconstitutional deprivation of which they complain. The alleged due process violation, defendants assert, was caused by state courts, not them. This argument is flawed. The state court judgment does not, by itself, cause a deprivation of property within the meaning of the Fourteenth Amendment. The deprivation is not complete until the judgment is enforced, and under the governing statute, the county has authority to enforce the judicially created liens. *See Fla.Stat. Ann. § 27.56(2) (West.Supp.1983)*. Defendants are not entitled to dismissal.

The order of the district court denying defendants' motion to dismiss is **AFFIRMED**.

APPENDIX B
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 79-408-Orl-Civ-R

BEATRICE S. WOOD, SANDRA SURBRUG RITTER,
on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

HARRY W. CARLS, III, *et al.*,
Defendants.

FILED
ORLANDO, FLA.
Sept. 1 1981
WESLEY R. THIES
CLERK

ORDER

This cause came on for consideration without oral argument on the following motion filed by defendants Orange County, Florida, and Kenneth Kienth, and thereon, it is

ORDERED:

Motion to Dismiss Second Amended Complaint.

Filing Date: 28 February 1980.

Disposition: Denied. On 5 February 1980, a second amended complaint was filed by the plaintiffs. Thereafter, on 28 February 1980, the defendants, Orange County, Florida, and Kenneth Kienth, Comptroller of Orange County, State of Florida, filed a motion to dismiss the second amended complaint. On 8 April 1980, this court noticed the motion to dismiss

for a hearing on 22 April 1980; however, upon motion by the defendants, Orange County, Florida, and Kienth, the hearing was continued until 2 June 1980. On 29 May 1980, the parties filed a joint motion for continuance of the hearing and asserted in their motion that they felt a continuance would result in a settlement of the case. The motion was granted by the court, but the parties were unable to settle the cause, and the plaintiffs filed a motion for partial summary judgment on 11 July 1980. That motion came on to be heard by the court on 26 January 1981 and on 17 March 1981 the motion for partial summary judgment was denied by the court. (See memorandum of decision and order of 17 March 1981 attached hereto.) Plaintiffs attempted to take an interlocutory appeal from that order, but failed to file the notice of appeal within the statutory time period. Plaintiffs thereafter dismissed their appeal and all parties requested the court to reset the motion to dismiss for hearing. The motion to dismiss the second amended complaint was heard by the court on 22 July 1981.

The facts alleged in the second amended complaint were set forth by the court in its memorandum of decision filed herein on 17 March 1981. In the memorandum of decision, this court stated that under numerous Fifth Circuit opinions it did not have subject matter jurisdiction under 42 U.S.C. § 1983 of 28 U.S.C. § 1343 to grant the relief sought by the plaintiffs because the remedy sought was the equivalent of a reversal of a final state court judgment. The same reasoning suggests the motion to dismiss the second amended complaint should be granted. However, subsequent to the court's memorandum of decision of 17 March 1981, the United States Court of Appeals for the Fifth Circuit issued opinions in the case of *Davis v. Page*, 640 F.2d 599 (5th Cir. 1981), pet. for cert. pending, and *Gresham Park Community Organization v. Howell*, 5th Cir., 8/10/81, ____ F.2d _____. Under the authority of those cases, it would appear that the district court might have jurisdiction. For that reason, the motion to dismiss is denied. For contrary authority see *Kimball v. The Florida Bar*, 632 F.2d 1283 (5th Cir. 1980); *Sawyer v. Overton*, 595 F.2d 252 (5th Cir. 1979);

Lampkin-Asam v. The Supreme Court of Florida, 601 F.2d 760 (5th Cir. 1979); *Almon v. Sandlin*, 603 F.2d 503 (5th Cir. 1979); *Buckley Towers v. Buchwald*, 595 F.2d 253 (5th Cir. 1979); *Reynolds v. State of Georgia*, 640 F.2d 702 (5th Cir. 1981), and *Dasher v. Supreme Court of Texas*, 5th Cir. 7/16/81, ____ F.2d ____.

Because of the obvious conflict in the foregoing cases, this court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Defendants shall have twenty days from the date of this order within which to file and serve an answer to the second amended complaint.

DONE AND ORDERED in Chambers at Orlando, Florida, this 31st day of August, 1981.

/s/ John A. Reed, Jr.
JOHN A. REED, JR.
Judge

APPENDIX C
IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF THE
STATE OF FLORIDA

Case No. 82-240

JAMES CHARLES BENTON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

RECEIVED
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DEPT. OF LEGAL AFFAIRS
TAMPA

Appeal From The Circuit Court In And For Lee County
State Of Florida

INITIAL BRIEF OF APPELLANT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL COURT

MICHAEL E. RAIDEN
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
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(813) 533-6715 or 533-1184

ATTORNEYS FOR APPELLANT

STATEMENT OF THE CASE AND FACTS

On January 16, 1981, an information was filed in the Circuit Court of the Twentieth Judicial Circuit, Lee County, charging Appellant, JAMES CHARLES BENTON, with manslaughter, a violation of Section 782.07, Florida Statutes (1979). (R8) Appellant pled guilty to this charge March 6, 1981, and was sentenced to twelve years minus credit for 172 days June 8, 1981, by the Honorable R. Wallace Pack, Circuit Judge. (R11)

On November 12, 1981, the court entered an "Order and Final Judgment" assessing a Public Defender fee of \$250 against Appellant. (R1) Appellant filed a *pro se* notice of appeal December 9, 1981. (R2)

ARGUMENT

ISSUE I.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY ASSESSING ATTORNEY FEES AGAINST APPELLANT?

Appellant, by his *pro se* notice of appeal, specifically attacks the November 12, 1981 order of Judge Pack assessing \$250 attorney's fees against Appellant. (R1-2) Appellant on January 19, 1981, had executed an affidavit of insolvency requesting the assistance of the Public Defender for his criminal charges. (R9-10) The affidavit included the following provision:

I waive notice of and right to appear at the hearing where the presiding Judge can and will assess a reasonable fee for the services of the Public Defender or appointed counsel in this matter, if I am found guilty.

(R9)

This provision conflicts with Section 27.56(7), Florida Statutes (1981), which allows an accused adequate notice of and the right to be heard regarding the imposition of costs for court-appointed attorney services. Nearly the identical situation arose in *Gryca v. State*, 315 So.2d 221 (Fla. 1st DCA 1975)—the appellant signed an affidavit of insolvency which was contained in a printed form furnished by the court and which included a

waiver of notice of any proceedings to determine the value of Public Defender services. The Court therein held that this clause impermissibly forced the appellant to abandon a statutory right in order to avail herself of a constitutional right. The reasoning in *Gryca* was approved in *McGeorge v. State*, 386 So.2d 29 (Fla.5th DCA 1980), wherein the appellant was placed on probation with the condition he waive notice of hearing regarding attorney's fees.

For these reasons Appellant submits the portions of the insolvency affidavits used in Lee County which include a waiver of notice are unconstitutional, and as a result the order assessing attorney's fees cannot be enforced without notice to Appellant (who was in prison at the time the order was entered, (R1)) and an opportunity for him to be heard.

CONCLUSION

For the above reasons and authorities Appellant respectfully requests this Honorable Court reverse the order assessing attorney fees and remand for such further proceedings after notice and hearing as are consistent with *Gryca v. State, supra*.

Respectfully submitted,

JERRY HILL

PUBLIC DEFENDER

TENTH JUDICIAL CIRCUIT

/s/BY: Michael E. Raiden

MICHAEL E. RAIDEN

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COUNSEL FOR APPELLANT